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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 217

CLINTON FOODS, INC., a Delaware Corporation,
Petitioner,

v.

MARVIN YOUNGS,
Respondent.

STATEMENT IN RESISTANCE TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Respondent resists the petition filed herein.

QUESTIONS PRESENTED.

Petitioner on page 3 of its petition states two questions: One, whether the Court of Appeals can ignore a contention otherwise determinative of a litigant's right to reversal; and the other, whether failure so to do is a denial of due process. Respondent submits upon the record that the Circuit Court of Appeals has not ignored in the slightest degree petitioner's contention. On the contrary, we shall show by reference to the opinion below and by a brief reference to certain of the facts that petitioner's claimed defense has been fully considered and has been definitely, but adversely, adjudicated.

STATEMENT.

A review of the entire record is obviously out of place at this juncture. Such facts as are relevant to the point presently under consideration concern themselves only with the question of whether the warning of an undisclosed and obscured peril to either the employer of respondent or to respondent himself was adequate to exonerate defendant from liability to plaintiff as an invitee. The warning contended for as being adequate was the placement of a sign, "Danger 13,200 volts," at one or two places in or near an enclosure of electrical transformers, coupled with a statement that the transformers were activated—that is to say, "hot." This was urged as a sufficient warning to apprise either the employer or the respondent of the lethal character of an apparently insulated wire. The use of insulated wire for the lead-in wire in question was admittedly abnormal and deceptive.

A warning is not adequate unless commensurate with the danger. It may not be self-contradictory. It may not confuse or mislead. It must be timely.

The sufficiency of the warning was also to be considered in the light of the further fact that the defendant was at all times during the progress of the work, at which respondent was employed, in active supervision of that work and frequently calling attention to the presence of an exposed bus bar, some distance removed from plaintiff's work, but making no reference to the apparently insulated lead-in wire, crucially adjacent to plaintiff's work.

The precise question before the Circuit Court of Appeals was whether there was a jury question as to the sufficiency of the warning in the light of these circumstances. This case has been argued now three times before the Circuit Court of Appeals—once before each of two separate panels and once before the Court sitting en banc. It would be a

singular situation indeed if any contention made by either litigant has been overlooked by that Court. Petitioner, fearing lest this court will think this matter has not been sensibly presented to the attention of the Court of Appeals, appends his several arguments heretofore made on these different occasions. Partisan as they may be, it is our opinion that a reading of the arguments will definitely indicate the question to have been one of fact and to have been correctly so recognized by the appellate court.

REASONS FOR NOT GRANTING THE WRIT.

1. Petitioner has been accorded a determination of the precise point of law urged so far as material to the decision of this case.

2. This is a fact case and the interest of the public in the consequences of the decision is relatively non-existent.

Petitioner continuously argued that a warning to the employer served to relieve it of further responsibility. It is the evident opinion of the court that a warning, to have any legal significance, must obviously be adequate to serve the purpose and fulfill the duty curtailed by the circumstances. Petitioner must agree that a warning to the employer must be as adequate as any warning given to the plaintiff. Adequacy, as we have said, must be measured in the light of the surrounding circumstances.

The fundamental error of petitioner is in seeking to contend that the position of the sign, "Danger 13,200 volts," and the statement that the transformers were "hot"—(that is to say, "activated")—completely covered the situation and constituted a defense regardless of all other facts in the case. As to this we quote the following from the opinion of the Circuit Court on page 21 in the appendix to the petition:

> "Defendant's position is two-fold. First, it is urged that because plaintiff was aware that the enclosure in

which he and others were working contained 13,200 volt equipment, coupled with his general knowledge that transformers are used to conduct electricity, completely relieved defendant of the duty to give any warning of the danger in and about the emergency transformers. Second, it is said that the warnings imparted by the signs bearing the legend 'Danger 13,200 volts,' coupled with the verbal statements made from time to time that the area was 'hot,' completely satisfied any legal obligation with respect to warning so as to remove that issue, as a matter of law, from the case. We are not persuaded to accept either contention."

The opinion of the court then proceeds to a realistic consideration of the effect attributed to these signs and so-called warning that these transformers were "hot". Perhaps the most direct way of meeting petitioner's contention will be by quoting the concluding portion of the opinion of the Court of Appeals:

"Reviewing the case in the most favorable light, we find that while there was evidence that knowledge had been imparted to employees of Pittsburgh that the enclosed area was 'hot,' logically, it can hardly be urged that the entire area was literally charged with electricity, or that Pittsburgh's employees should believe it to be so. Indeed, defendant itself recognized that such was not the situation, for it prepared the plans whereby it became necessary to lay the water main through the area. By so doing, and by directing a specific warning only to the open, uncased, corrugated transformers and the 440-volt bus bar adjacent thereto, the jury could properly find that, implicit in defendant's 'invitation' to work within the area was the representation that the area was relatively safe, except around the dangerous instrumentality; i. e., the uncased transformers and bus bar. That the entire

area was not virtually a 'chamber of horrors' is borne out by defendant's conduct during the course of the pipe installation. Although defendant must be charged with knowledge of the dangerous character of the lead-in wire which injured plaintiff, all specific warnings were directed solely to the uncased transformers. Through its representative who was supervising the installation, the defendant repeatedly warned Pittsburgh employees of the danger that lurked in and about the bus bar and corrugated transformers. They were told '(n)ow, you are getting where that is dangerous. You can walk into that, and if you do it will bite. In that situation I specifically pointed out the bus bar because they had piled the dirt so high you could walk right into it.' But there the verbal warning stopped. There is credible evidence from which a jury could properly find that at no time was there any warning given that inasmuch as the lead-in wire carried as much as 13,000 volts, it was even more dangerous to work in close proximity to this wire. Surely defendant was fully aware that work was progressing in the immediate vicinity of the emergency transformers. Defendant's supervisor, Mr. Shannon, testified, 'I had been there within a few minutes before the accident. I had just left when the accident happened.' But he gave no warning of the impending danger, at least there is evidence that he did not. Nor are we justified in holding that, apart from any oral warnings, plaintiff's knowledge, as a reasonable man, concerning the dangerous character of electrical equipment generally, would bar him from recovery as a matter of law. That the dangerous object which caused the havoc to plaintiff was neither open nor obvious is scarcely debatable for as we have seen, the offending device (the lead-in wire), was covered with insulation, and this, together with the fact that all specific warnings were directed to the

> 440-volt bus bar, could have the conceivable effect of lulling a reasonably prudent person into a sense of safety. But the insulation was not intended nor designed to render the wire harmless if contact therewith was made. In the words of defendant's Mr. Shannon: 'It isn't customary to insulate that tension of wire and wasn't put there for insulation purpose. Normally that wire would be bare because for purposes of insulation, that insulation was absolutely worthless—might just as well not be there.'
>
> "We have indulged in an exhaustive review of the facts, and have carefully studied decisions of the Iowa courts bearing upon our factual situation. As previously discussed, the particularly dangerous element of electricity here involved is a circumstance properly to be considered by a jury in determining whether defendant has exercised ordinary care. Here, there was evidence from which a jury could justifiably find that the wire which injured plaintiff constituted a latent danger; that this danger was known to defendant; that plaintiff did not have actual knowledge thereof and in the exercise of ordinary care on his part would not have discovered the same; and that, under the circumstances, the warning given by defendant was inadequate."

It surely must be evident that the court was fully apprised of petitioner's contentions, that the court gave them extensive consideration and that the court did not misinterpret, misapply or for that matter ignore any applicable Iowa law. Implicit in the court's opinion is the thought that whatever might be the result of an adequate warning to the employer is immaterial and irrelevant to the issue here for the reason that under the facts the so-called warning was inadequate. In plain terms measured in the light of all the circumstances shown in this record, what was said and done did not constitute, as a matter of

law, such a warning as must be said to be a complete avoidance of further responsibility by the petitioner. Nothing in the Iowa cases cited by petitioner expresses any rule of law with which the opinion of the Circuit Court of Appeals is not in perfect harmony nor which it ignores.

It is respectfully submitted that the petition should be denied.

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